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SUPREME COURT, U.S.
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No. 02-399

In The

Supreme Court of the United States

EVELYN R. KRAFT,

Petitioner,

v.

WASHINGTON MUTUAL BANK, N.A.,
CAL-WESTERN RECONVEYANCE CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondent Cal-Western Reconveyance Corporation is a privately held corporation. No publicly held company owns 10% or more of the corporation's stock.

Respondent Washington Mutual Bank is a subsidiary of Washington Mutual Bank, Inc. No publicly held company owns 10% or more of the corporation's stock.

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STATEMENT OF THE CASE

This appeal arises out a decision of the United States Ninth Circuit Court of Appeals, which affirmed an order of the United States Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals, which affirmed an order of the United States Bankruptcy Court for the Central District of California. By an order dated July 26, 2000, the Bankruptcy Court retroactively annulled the automatic stay as to Cal-Western Reconveyance Corporation ("Cal-Western") and Washington Mutual Bank, N.A. ("Washington Mutual") in the second of two chapter 13 bankruptcy cases filed by the Debtor between February and April of 1998.

The Petitioner first filed a voluntary chapter 13 bankruptcy petition on February 4, 1998 (the "first bankruptcy case"). This filing occurred one day prior to the scheduled foreclosure sale on the Petitioner's residence located at 3604 W. Estates Lane, Unit 315, Palos Verdes, California 90274.

The first bankruptcy case was dismissed on April 13, 1998, based upon the Petitioner's failure to make pre-confirmation plan payments to the Chapter 13 Trustee. Two days after the dismissal of the first bankruptcy case, the Petitioner filed a second Chapter 13 petition (the "second bankruptcy case"). The Petitioner again failed to make any pre-confirmation plan payments to the Chapter 13 Trustee, failed to make any post-petition mortgage payments, and failed to appear at the initial meeting of creditors set for Friday, June 12, 1998.

As a result, the Chapter 13 Trustee submitted an order to dismiss the second bankruptcy case with a 180 day bar to re-filing another bankruptcy case. On Monday,

June 15, 1998, just one business day later, the Petitioner filed a conversion of the second bankruptcy case to a Chapter 7, thus evading a 180 day bar to further bankruptcy relief.

On September 2, 1998, based on a P.A.C.E.R. Report which read "Order Discharging Chapter 13 panel Trustee and Exonerating Bond Liability" and "Final Report of Trustee in Asset Case", Cal-Western mistakenly believed that the Petitioner was discharged and that the automatic stay terminated by operation of law. As a result, in its capacity as foreclosure trustee for Washington Mutual, Cal-Western proceeded with the foreclosure sale that had been continued to that date during the pendency of the second bankruptcy case. A third party known as Diversified Properties purchased the subject property at the sale. Upon learning that it held the Trustee's sale in violation of the automatic stay, Cal-Western recorded a Rescission of the already recorded Trustee's Deed Upon Sale.

On November 17, 1998, Diversified Properties brought a Motion to Annul the Automatic Stay in the Bankruptcy Court. Diversified Properties requested that the Court annul the stay retroactively to validate the foreclosure sale. Concurrently, Washington Mutual brought a motion to invalidate the sale. On December 31, 1998, the Court granted Diversified Properties' Motion and annulled the Automatic Stay retroactive to September 2, 1998, the date of the Trustee's sale. The Bankruptcy Court also denied Washington Mutual's motion to invalidate the sale. On March 1, 1999, Cal-Western rescinded the previously recorded Rescission of the Trustee's Deed Upon Sale.

The Petitioner's second bankruptcy case closed on January 29, 1999. On August 31, 1999, the Debtor filed a

complaint against Cal-Western and Washington Mutual in the United States District Court for the Central District of California, claiming damages for an alleged willful violation of the automatic stay. On January 7, 2000, Cal-Western brought a Motion to Dismiss the Amended Complaint on the grounds that the Debtor did not have standing to pursue the alleged claims. On March 1, 2000, the United States District Court granted Cal-Western's Motion to Dismiss, staying the dismissal for 60 days to permit Debtor to pursue relief in the Bankruptcy Court. The Bankruptcy Court re-opened the second bankruptcy case on the Petitioner's motion by an order dated May 11, 2000. Cal-Western and Washington Mutual then filed a motion to annul the stay retroactive to April 15, 1998, the filing date of the second bankruptcy case. The Bankruptcy Court granted the motion over the Debtor's opposition by an order dated July 26, 2000.

The Debtor appealed the Bankruptcy Court's Order to the United States Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals. By an unpublished memorandum decision dated March 15, 2001, the Bankruptcy Appellate Panel affirmed the decision of the Bankruptcy Court. The United States Court of Appeals for the Ninth Circuit affirmed the decision of the Bankruptcy Appellate Panel by an unpublished decision dated May 13, 2002.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for Writ of Certiorari for three reasons. First, neither the decisions below nor the record raise the first or third questions presented in the petition. Regarding the first question presented, the

courts below did not require the petitioner to establish eligibility for bankruptcy protection as a prerequisite to the applicability of the automatic stay. Instead, the courts below recognized that a stay arose by operation of law pursuant to 11 U.S.C. § 362 upon the filing of a bankruptcy petition, but applied the Bankruptcy Code and decisional authority to determine that cause existed to annul the automatic stay retroactively under the specific facts of the case. Regarding the second question presented, none of the courts below ruled on the applicability of 11 U.S.C. § 549, subd. (c) to the present case, meaning it cannot serve as a basis for granting certiorari.

Second, no split of authority exists among the Circuits concerning the circumstances under which a bankruptcy court may annul the automatic stay under 11 U.S.C. § 362(d). The Petitioner would have this Court set rigid criteria for courts to apply in evaluating whether to annul the automatic stay. However, no Circuit has set such rigid criteria, and the Ninth Circuit, the First Circuit, and lower courts in other Circuits have correctly recognized that courts should analyze the specific facts of each case and determine the propriety of annulment based upon the consideration of multiple factors. *See National Environmental Waste Corp. v. City of Riverside (In re Nat'l Envtl. Waste Corp.)*, 129 F.3d 1052, 1054 (9th Cir.1997); *In re Soares*, 107 F.3d 969, 977 (1st Cir.1997).

Third, the Bankruptcy Court correctly annulled the automatic stay after considering the specific circumstances of the case in light of the factors specified in *Nat'l Envtl.* The Bankruptcy Court recognized that the utter absence of changed financial circumstances between the Petitioner's bankruptcy filings justified annulment in this

case, and the reviewing courts did not abuse their discretion in affirming that decision.

A. The Decision Below does not Present the Questions of the Petitioner's Eligibility for Protection of the Automatic Stay

The Petitioner attempts to create an issue for review by characterizing the decisions below as requiring the Petitioner to establish her eligibility for bankruptcy protection as a prerequisite to the applicability of the automatic stay. However, neither the facts of the case below nor bankruptcy law present this question.

The automatic stay arises by operation of law upon the filing of a bankruptcy petition. 11 U.S.C. § 362(a); *Nat'l Envtl.*, *supra*, 129 F.3d at 1054; *Soares*, *supra*, 107 F.3d at 975. Nevertheless, Bankruptcy Code section 362(d)(1) gives courts discretion to "terminate, *annul*, modify, or place conditions upon the automatic stay." (Emphasis added.) The power to annul the stay includes the power of courts to grant retroactive relief from the automatic stay. *Nat'l Envtl.*, *supra*, 129 F.3d at 1054; *Soares*, *supra*, 107 F.3d at 977.

The automatic stay arose in the case below when the Petitioner filed her second bankruptcy case on April 15, 1998. The Bankruptcy Court annulled the stay only after a noticed motion by Cal-Western and Washington Mutual specifically requesting annulment of the stay retroactive to the date of filing. Consequently, the case below involved the undisputed authority of the Bankruptcy Court to annul the automatic stay after consideration of all of the surrounding circumstances.

Further, the cases cited by Petitioner for the proposition that some Circuits require evidence of a debtor's eligibility for bankruptcy protection as a pre-condition to operation of the automatic stay do not stand for that principle. In *Trident Associates Limited Partnership v. Metropolitan Life Insurance Company (In re Trident Associates Limited Partnership)*, 52 F.3d 127 (6th Cir.1995), the Court granted a motion to lift the automatic stay filed one and one-half weeks *after* the filing of the petition and the undisputed operation of the stay. The *Trident* court granted relief for cause based upon the debtor's lack of good faith in filing the case, but did not condition the operation of the stay upon a showing of eligibility. *Id.* at 130-31.

The Second Circuit Court of Appeals decision in *Casse v. Key Bank N.A. (In re Casse)*, 198 F.3d 327 (2nd Cir.1999) involved the effect of an order entered in a prior bankruptcy case prohibiting the same debtor from filing a new bankruptcy petition. The case below does not present this issue because it involved a motion to annul the stay retroactively by Cal-Western and Washington Mutual after the stay already arose, and not a pre-existing order prohibiting the Petitioner from seeking relief under the Bankruptcy Code.

Since the automatic stay arose by operation of law when Petitioner filed her second bankruptcy case, and because the Petition fails to reveal a dispute among the Circuits that the stay arises automatically upon the filing of a petition, the Court should deny the petition for review.

B. The Decision below Does Not Present Any Question Regarding 11 U.S.C. § 549

The third question presented in the petition purports to raise an issue concerning the scope of an order under 11 U.S.C. § 549, subd. (c). However, the order of the United States Bankruptcy Court for the Central District of California from which Petitioner originally appealed contains no reference to that section. The decision of the United States Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals refers to the section once, but only in the context of finding the Petitioner's appeal was not moot. The Ninth Circuit Court of Appeals decision does not mention section 549. Consequently, Petitioner's characterization of a single reference to section 549 by the Bankruptcy Appellate Panel as an "alternative holding" grossly misrepresents the record and cannot form the basis for a grant of certiorari in this case.

C. No Split of Authority over the Factors Governing Annulment of the Stay Exists

The Petitioner would have this Court create a test requiring creditors seeking annulment of the stay to show "one or more" of the inability to comply with the stay, extreme circumstances, or entitlement to prospective relief. (Petition at p. i.) However, a uniform test for courts to apply in determining whether to annul the stay already exists. Further, no Circuit decision supports the Petitioner's proposed test, which would limit the uniformly recognized discretion vested in the bankruptcy courts to determine the propriety of annulling the automatic stay in a particular case.

Bankruptcy Code section 362(d), subdivisions (1)-(3), already specifies the only bases on which courts can issue an order annulling the automatic stay. Subdivision (d)(1) provides that courts may annul the stay based upon a showing of "cause". The Circuits have uniformly recognized that although the Bankruptcy Code does not define the term cause, the determination of whether cause exists requires an analysis of multiple factors and the specific circumstances of each case. *See Nat'l Envtl., supra,* 129 F.3d at 1055 (court engages in case-by-case analysis and balances the equities in order to determine whether retroactive annulment is justified); *Soares, supra,* 107 F.3d at 977 ("[w]e do not suggest we can write a standard that lends itself to mechanical application. Each case is sui generis and must be judged accordingly."); *Albany Partners, Ltd. v. W.P. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 675-76. The principle of providing discretion to the bankruptcy courts to determine whether cause exists under the specific facts of each case underlies each of these decisions, and represents a sound and equitable test for courts to apply.

The factors identified by Petitioner in her proposed test either lack legal support or represent matters on which the Circuits already agree. For example, Petitioner cites *Soares* as supporting the position that courts should only grant retroactive relief when the creditor has the inability to comply with the automatic stay. However, *Soares* explicitly permits annulment of the automatic stay solely upon a showing of the debtor's bad faith, and regardless of notice of the stay. *See Soares* at 977. In addition, all of the Circuits – including the Ninth – acknowledge that annulment of the automatic stay represents a form of relief available in limited circumstances. *See Matava v. Kissinger (In re Kissinger)*, 72 F.3d 107 (9th

Cir.1995). Thus, the claim that some Circuits do not require a showing of "extreme" circumstances represents an attempt to create a dispute among Circuits where none exists.

Finally, Petitioner's contention that the Ninth Circuit does not require a moving party to show an entitlement to prospective relief as a condition to obtaining an order annulling the stay grossly misstates the law. A moving party may only obtain an order granting relief or annulment of the stay if it satisfies one of the conditions specified in Bankruptcy Code section 362(d). A creditor could not obtain retroactive relief from the automatic stay if it could not also establish an entitlement to prospective relief from stay. As discussed in section D. *infra*, the Petitioner's lack of good faith in filing her second bankruptcy case constituted cause for retroactive relief under 11 U.S.C. § 362(d)(1), and would similarly have supported an order granting prospective relief from the automatic stay. Based on the foregoing, the purported split among the Circuits does not exist, making review by this Court unnecessary.

D. The Decisions Below Were Correct

A decision retroactively lifting the automatic stay is reviewed for an abuse of discretion. *Nat'l Envtl, supra*, 129 F.3d at 1054, citing *Kissinger, supra*, 72 F.3d at 108. The decision to grant or deny relief from the automatic stay is committed to the sound discretion of the bankruptcy court. *In re Conejo Enterprises, Inc.*, 96 F.3d 346, 351 (9th Cir.1996), *citing In re Arnold*, 806 F.2d 937, 938 (9th Cir.1986); *In re MacDonald*, 755 F.2d 715, 716 (9th Cir.1985). Decisions committed to the bankruptcy court's

discretion will be reversed only if "based on an erroneous conclusion of law or when the record contains no evidence on which [the bankruptcy court] rationally could have based that decision." *Conejo*, *supra*, 96 F.3d at 351, citing *In re Windmill Farms, Inc.*, 841 F.2d 1467, 1472 (9th Cir.1988).

The debtor's lack of good faith in filing a bankruptcy case constitutes cause for relief from stay. *In re Arnold*, 806 F.2d 937, 939 (9th Cir.1986); *Soares*, *supra*, 107 F.3d at 977. The filing of successive bankruptcy cases without proof of changed circumstances constitutes bad faith. *In re Metz*, 820 F.2d 1495, 1497 (9th Cir.1987). Under Bankruptcy Code section 362(g)(2), the debtor has the burden of proof to demonstrate that "cause" does not exist to annul the stay under section 362(d)(1). *See also United Enters., Ltd. v. ACI Sunbow, LLC (In re ACI Sunbow, LLC)*, 206 B.R. 213, 217 (Bkrtcy.S.D.Cal. 1997).

The underlying facts reveal the Debtor's bad faith and failure to demonstrate changed financial circumstances between the filing of her bankruptcy cases. The Bankruptcy Appellate Panel cited the following findings of the Bankruptcy Court to support the order annulling the stay: the court would have granted relief "in a flash" had Washington Mutual sought it at the time of the foreclosure sale (Petition at p. 9a); the Petitioner filed the second chapter 13 absent changed circumstances, and converted to chapter 7 to avoid the chapter 13 trustee's motion to dismiss with a 180 day bar to re-filing, which indicated bad faith (Petition at 10a); Washington Mutual did not engage in willful conduct, particularly because it attempted to rescind the sale. (*Id.*) Further, the Bankruptcy Appellate Panel noted that the Petitioner cited no evidence that she

filed her second chapter 13 case in good faith, and noted that Petitioner was precluded from offering such evidence based upon the final order annulling the automatic stay obtained by Diversified Properties, from which Petitioner did not appeal. (*Id.*)

The foregoing reveals that the Bankruptcy Court appropriately exercised its discretion to annul the automatic stay retroactive to the date of the filing of the Petitioner's second bankruptcy case. Since no split exists among the Circuits regarding the standards applicable to annulment of the automatic stay, and since the Bankruptcy Court did not abuse its discretion in granting retroactive relief from stay, review of the decision of the Ninth Circuit Court of Appeals is not necessary.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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